Order

Michigan Supreme Court
Lansing, Michigan

December 29, 2021

161672

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

CHARLETTE LEGION-LONDON, a/k/a CHARLETTE LEGION, a/k/a CHARLETTE LONDON,
Plaintiff-Appellee,

v

SC: 161672
COA: 344838
Oakland CC: 2016-155115-NH

THE SURGICAL INSTITUTE OF MICHIGAN AMBULATORY SURGERY CENTER, LLC, MICHIGAN BRAIN & SPINE PHYSICIANS GROUP, PLLC, and ARIA SABIT, M.D.,
Defendants-Appellees,

and

KEVIN CRAWFORD, D.O., PC and KEVIN CRAWFORD, D.O.,
Defendants-Appellants.

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On December 8, 2021, the Court heard oral argument on the application for leave to appeal the February 6, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

ZAHRA, J. (*dissenting*.)

I dissent from this Court's denial order issued after oral argument on the application because the Court of Appeals majority's decision is incorrect and its interpretation of the 2010 amendments of the Michigan Court Rules poses significant constitutional questions in regard to this Court's authority to promulgate "substantive" policy under the guise of its "procedural" rulemaking authority. I would reverse the Court of Appeals and remand this matter to the trial court for entry of judgment in favor of defendant Dr. Crawford.

MCL 600.2912d(1) governs causes of action alleging medical malpractice and states, in relevant part, that "the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]." MCL 600.2169(1)(a) requires that "if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty."

Plaintiff underwent spinal surgery on March 14, 2012, and discovered as early as October 28, 2015, that the surgery was unnecessary or not performed. Dr. Aria Sabit,[1] a neurosurgeon, had performed the surgery, and defendant Dr. Kevin T. Crawford, D.O., a board-certified orthopedic surgeon, had assisted Dr. Sabit. On March 17, 2016, plaintiff sent a statutorily required notice of intent to file a claim (NOI)[2] in which she asserted that Dr. Crawford is a neurosurgeon.[3] On or about August 11, 2016, Dr. Crawford sent a written response to the NOI expressly informing plaintiff that he is a board-certified orthopedic surgeon. Plaintiff filed her complaint on September 19, 2016, and filed an affidavit of merit (AOM) signed by a neurosurgeon, stating that the relevant standard of care was that of a neurosurgeon. Despite being expressly informed by Dr. Crawford that he is a board-certified orthopedic surgeon, plaintiff failed to take any action before the expiration of the limitations period to secure a valid AOM.[4] On December 5, 2016, Dr. Crawford filed a motion for summary disposition, arguing that plaintiff had not demonstrated a reasonable belief under which the AOM could be considered timely pursuant to the governing statute, MCL 600.2912d(1). The trial court agreed and granted the motion.

On April 12, 2017, plaintiff sought to "amend" the AOM by submitting a second affidavit signed by a board-certified orthopedic surgeon. The trial court rejected this attempt to amend the first AOM because the second affidavit was an entirely different

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[1] Dr. Sabit defaulted, and the case proceeded only against Dr. Crawford.

[2] MCL 600.2912b(1).

[3] Under MCL 600.5856(c), "[i]f a plaintiff files a notice of intent (NOI) to file a claim before the limitations period for the malpractice action expires, but the limitations period for the malpractice action would otherwise expire during the 182-day notice period, the statute of limitations for the malpractice action is tolled for the duration of the notice period," *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 307 (2017), which in this case leaves 42 days of the limitations period remaining.

[4] MCL 600.2912d(2) provides for a 28-day extension to file an AOM after the complaint is filed upon a showing of good cause. Plaintiff did not request any extension under this statutory provision.

affidavit that was signed by a different surgeon in a different area of specialty. This, the trial court concluded, constituted much more than an amendment.

Our court rules currently purport to treat an AOM "in accordance" with other pleadings under MCR 2.118, such as a complaint that may be freely amended.[5] The court rules recognize, though, that an AOM is not an actual pleading.[6] This makes sense because an AOM is not a pleading; rather, it is an affidavit from a person attesting to the merit of a case. Thus, even though a party might seek to amend an AOM in accordance with MCR 2.118, any amendment must adhere to the inherent nature of a sworn affidavit.

In my judgment, only an affiant may amend the AOM. An affidavit, after all, is a sworn statement by the affiant—the person signing the affidavit. An "affidavit" is defined, in relevant part, as "[a] voluntary declaration of facts written down and sworn to by a *declarant* . . . ."[7] Common sense dictates that an amendment of an affiant's affidavit executed by a different affiant necessarily is a different affidavit, not a change to the old one. Because the new affidavit is made by a new affiant, it consists of an entirely new "declaration," even if the second affiant repeats some or all of what the first affiant declared. Thus, while plaintiff can request that the affiant amend the AOM, if a new affiant is required, the action exceeds the scope of an amendment under the 2010 amendments of the Michigan Court Rules. Accordingly, plaintiff necessarily filed a new AOM when she filed an AOM with a different affiant.

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[5] MCR 2.112(L)(2)(b).

[6] MCR 2.110, titled "Pleadings," provides, in pertinent part:

> (A) Definition of "Pleading." The term "pleading" includes only:
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> (1) a complaint,
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> (2) a cross-claim,
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> (3) a counterclaim,
>
> (4) a third-party complaint,
>
> (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and
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> (6) a reply to an answer.
>
> No other form of pleading is allowed.

[7] *Black's Law Dictionary* (11th ed) (emphasis added). An "amendment" is "[a] formal and a usu[ally] minor revision or addition proposed or made . . . by addition, deletion, or correction; esp., an alteration in wording." *Id.*

The Court of Appeals majority posits that an amendment to change an affiant is clearly contemplated by the phrase "challenges to the qualifications of the signer . . . ."[8] The majority reasons that "[b]ecause such a correction will, for all intents and purposes, require that a different health professional sign the affidavit, the text of the rule allows a plaintiff to amend an AOM by submitting one signed by a properly qualified physician."[9]

I read MCR 2.112(L)(2)(b) differently and conclude that the two sentences are independent. The first sentence relates to timing and challenges. Successful "challenges to the qualifications of the signer" do not expressly contemplate an amendment of the AOM by course under MCR 2.118. Further, the sentences are independent because there is no presumptive linkage between the timeliness of a challenge to the qualifications of the signer and an amendment of the AOM. In other words, simply because MCR 2.112(L)(2)(b) expressly recognizes that a party may assert "challenges to the qualifications of the signer" does not mean that a successful challenge presumes the AOM can be amended on that basis. The rule is silent in this regard. Accordingly, I am not convinced that MCR 2.112(L)(2)(b) expressly contemplates an amendment of an AOM executed by an unqualified affiant. My understanding of MCR 2.112(L)(2)(b) does not render nugatory the phrase "qualifications of the signer." As noted by Court of Appeals Judge CAMERON in dissent:

> I agree that in some cases, a plaintiff could be required to procure an entirely different expert witness after a defendant has successfully challenged the qualifications of the medical professional who signed the original affidavit of merit. However, in certain cases, an expert's qualifications can be corrected or supplemented within the original affidavit of merit. In such cases, a new affidavit from a new affiant would not need to be filed in order for a plaintiff to continue to pursue his or her medical malpractice action. For example, in the event that an expert's qualifications are not described accurately or completely in the AOM, it would certainly be appropriate for a trial court to permit amendment of the AOM. In such circumstances, the plaintiff would not be seeking to replace the original expert's AOM. Rather, the plaintiff would be seeking to correct an error or provide additional facts within the original AOM. Thus, reading MCR 2.112(L)(2)(b) to not permit entirely new AOMs does not render the phrase "qualifications of the signer" nugatory.[10]

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[8] MCR 2.112(L)(2)(b).

[9] *Legion-London v Surgical Institute of Mich Ambulatory Surgery Ctr, LLC*, 331 Mich App 364, 370 (2020).

[10] *Legion-London*, 331 Mich App at 385-386 (CAMERON, P.J., dissenting).

Most importantly, by denying defendant's application for leave to appeal in this case, the Court not only lets stand a highly questionable, divided, and published Court of Appeals opinion but also effectively overrules *Kirkaldy v Rim*,[11] in which we held that "the proper remedy" when a court finds an AOM to be defective "is dismissal without prejudice," leaving the plaintiff with "whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit." The work of overruling *Kirkaldy* started with the 2010 amendments of MCR 2.112 and MCR 2.118. When adopting these amendments, a simple question was posed:

> How should a sitting trial judge or a trial lawyer decide which affidavit of merit rules apply—those set forth in this new rule or those set forth in *Kirkaldy*?[12]

Despite public assurances from the then Chief Justice and two other former justices that the amendments did not overrule *Kirkaldy*, we now know that dissenting Justices CORRIGAN, YOUNG, and MARKMAN were correct to suspect otherwise. The Court of Appeals majority opinion in this case makes clear that the answer to the simple question posed above is that the amendments are to be followed. Letting the Court of Appeals majority opinion stand in this case is contrary to the assurances of Chief Justice KELLY "that the amended court rules are merely 'permissive in nature' and therefore do not run afoul of *Kirkaldy*, which would only apply when 'a court denies a request to amend a defective affidavit of merit . . . .' "[13] Under the Court of Appeals' decision, it is difficult to envision a change to an AOM that would not be deemed a permissible "amendment." Thus, there is little to no room left for *Kirkaldy* to govern.

Here, the trial court reasonably determined that plaintiff's attorney did not submit with the complaint an "affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably believes* meets the requirements for an expert witness under section 2169."[14] Not only was the AOM defective on its face because the affiant was a neurosurgeon and Dr. Crawford is an orthopedic surgeon, but Dr. Crawford had sent plaintiff a written response to plaintiff's NOI explaining that he is a board-certified orthopedic surgeon. Yet, plaintiff filed her complaint with the defective AOM without even attempting to file a motion for good cause shown to receive an additional 28 days to

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[11] *Kirkaldy v Rim*, 478 Mich 581, 586 (2007).

[12] MCR 2.112 and MCR 2.118, 485 Mich cclxxv, cclxxxv (2010) (YOUNG, J., dissenting).

[13] *Id*., quoting MCR 2.112 and MCR 2.118, 485 Mich at cclxxix-cclxxx (KELLY, C.J., concurring).

[14] MCL 600.2912d(1) (emphasis added).

file the AOM.[15] Moreover, after the trial court dismissed the claims against Dr. Crawford, plaintiff's attorney secured a proper AOM within 18 days, meaning that with minimal effort plaintiff's attorney could have readily prevented the dismissal of plaintiff's claim. Instead, plaintiff's attorney opted to make the dubious argument that a neurosurgeon and orthopedic surgeon are basically the same.[16]

The Court of Appeals majority did not address that MCL 600.2912d(1) precludes a complaint from being filed if the plaintiff's attorney does not have a reasonable belief that the AOM is valid. Instead, the majority relies solely on its dubious interpretation of the court rules to permit any amendment of the AOM under MCR 2.112(L)(2)(b), which then relates back to the original "filing," MCR 2.118(D), even though the original "filing" was invalid because plaintiff's attorney did not have a reasonable belief that the initial AOM was valid. Seemingly, then, it makes no difference whether the attorney reasonably believed the AOM met the standards. The Court of Appeals majority's interpretation of the court rules thus renders nugatory the statutory requirement that "the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably believes* meets the requirements for an expert witness under [MCL 600.2169]."[17] The upshot of the majority's published Court of Appeals opinion is that "a plaintiff will be able to file a complaint with a defective affidavit of merit and then wait indefinitely to file an amended conforming affidavit, rendering the two-year period of limitations essentially meaningless."[18] Plaintiffs can now file placeholder AOMs, confident that they will be able to amend them much later, without any regard for the statute of limitations.

In addition, now that the Court has effectively overruled *Kirkaldy*, significant constitutional questions emerge. At the time that the 2010 court rule amendments were debated, Justice MARKMAN expressed concerns regarding whether the proposed amendments were constitutionally sound. These concerns have more resonance today. Specifically, Justice MARKMAN claimed that the 2010 court rule amendments

> may well be unconstitutional by failing to respect the command in article 6, § 5 of Michigan's constitution that court rules must confine themselves to matters of procedure, not substance. See *McDougall v Schanz*, 461 Mich 15 (1999). The thrust of these amendments certainly seems to be

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[15] MCL 600.2912d(2).

[16] See *Bates v Gilbert*, 479 Mich 451, 461 (2007), in which this Court held that the plaintiff's attorney could not have reasonably believed that an AOM from an ophthalmologist would suffice against the defendant, an optometrist.

[17] MCL 600.2912d(1) (emphasis added).

[18] MCR 2.112 and MCR 2.118, 485 Mich at ccxci (MARKMAN, J., dissenting).

> to effectively modify statutes of limitations in medical malpractice cases, a matter that this Court itself has previously determined constitutes substantive law and is properly the responsibility of the Legislature. See, for example, *Gladych v New Family Homes, Inc*, 468 Mich 594, 600-601 (2003) ("Statutes regarding periods of limitations are substantive in nature" and "to the extent [MCL 600.5856] enacts additional requirements regarding the tolling of the statute of limitations, the statute would supersede the court rule.").[19]

In sum, the Court of Appeals majority's interpretation of the 2010 court rule amendments now makes clear that these "procedural" amendments were judicial legislation in which the Court imposes its perceived substantive policy preferences over that of duly enacted legislative tort-reform measures. Because the Court of Appeals majority's decision is incorrect and its interpretation of the 2010 court rule amendments poses significant constitutional questions in regard to this Court's authority to promulgate "substantive" policy under the guise of its "procedural" rulemaking authority, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

[19] *Id.* at ccxcii.